Supreme Court, U.S.
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NO. 92-953

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JOANNE W. COLEMAN,

Petitioner,

v.

NATIONWIDE LIFE INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIROARI

John B. Mann
(Counsel of Record)
LEVIT & MANN
419 North Boulevard
Richmond, Virginia 23220
(804) 355-7766

Stephen R. Bruce
Attorney at Law
727 15th St., NW, Ste. 900
Washington, D.C. 20005
(202) 371-8013
Attorneys for Petitioner

Dated: November 10, 1992

QUESTIONS PRESENTED FOR REVIEW

1. Whether ERISA §§404 and 405's fiduciary duties allow an insurer to cast a blind eye to an employer's breach of a disclosure duty and refuse to give any notice to a health plan beneficiary that the group medical coverage she is relying on is in jeopardy because of the employer's failure to make premium payments?

2. Whether ERISA §§404 and 405's fiduciary duties allow an insurer to affirmatively represent that a beneficiary's health expenses will be covered even when the insurer knows that the employer has failed to make premium payments and then to turn around and later retroactively revoke insurance coverage on that basis?

3. Whether the federal common law of estoppel prevents an insurer from affirmatively representing that a beneficiary has health coverage and then later seeking to retroactively void that coverage based on facts that were known to the insurer at the

time it made the affirmative representations?

PARTIES TO THIS PROCEEDING

Joanne W. Coleman
1013 Greystone Avenue
Richmond, VA 23224

Nationwide Life Insurance Company
P.O. Box 2399
Columbus, Ohio 43216

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NATIONWIDE LIFE INSURANCE COMPANY,
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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Joanne W. Coleman, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on July 1,

1992. A petition for rehearing and suggestion for rehearing en banc was denied on July 24, 1992.

I.

OPINION BELOW

On July 1, 1992, the Court of Appeals for the Fourth Circuit entered an opinion dismissing the claims of Joanne Coleman, Petitioner, for violations of ERISA, 29 U.S.C. §1001 et seq. A copy of the initial opinion of the U.S. District Court for the Eastern District of Virginia, which is reported at 748 F. Supp. 429, is attached as Appendix A. A copy of the District Court's unreported July 18, 1991 opinion in response to Nationwide's motion to alter or amend is attached as Appendix B. A copy of the Fourth Circuit's July 1, 1992 opinion, which is reported at 969 F.2d 54, is attached as Appendix C. The denial of

rehearing and suggestion for rehearing en banc is attached as Appendix D.

II.

JURISDICTION

On July 1, 1992, the Court of Appeals entered its opinion dismissing the claims of defendant and reversing the judgment of the United States District Court for the Eastern District of Virginia. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

III.

STATUTORY PROVISIONS INVOLVED

This case involves the Employee Retirement Income Security Act of 1974 (ERISA), specifically ERISA §§404 and 405(a) and (c), 29 U.S.C. §§1104 and 1105(a) and (c). The relevant text of these provisions is reproduced in Appendix E.

IV.

STATEMENT OF THE CASE

A. Course of Proceedings Below

The Appellee, Joanne Coleman ("Coleman"), filed a complaint in the United States District Court for the Eastern District of Virginia on January 12, 1990 alleging that she was wrongfully denied medical and health care benefits under a group health insurance policy that Nationwide Life Insurance Company ("Nationwide") issued to her husband's employer, Roofing Concepts. Coleman asserted that Nationwide breached the fiduciary duties imposed on it by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 et seq. ("ERISA" or "the Act"), by advising her that the coverage was in effect at the time of her hospitalization on January 27, 1989. In its answer, Nationwide alleged that no group health insurance coverage was in

effect at the time that Mrs. Coleman was provided medical care because Roofing Concepts had not paid the insurance premiums in full. Nationwide further contended that it intended to assign all disclosure duties under ERISA to the employer so that it, Nationwide, would not be responsible for informing or misinforming beneficiaries about their benefits.

Both parties filed cross motions for summary judgment. By Order dated October 16, 1990, the district court granted Coleman's motion for summary judgment under alternative theories of breach of fiduciary duty and estoppel. The trial court ordered Nationwide to pay $6,048.86, which represented the hospitalization costs and expenses due her under the terms of the policy, plus reasonable costs and attorneys fees.

On February 19, 1991, Nationwide

filed a motion to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59. On July 18, 1991, the court issued an Order and Memorandum Opinion granting Nationwide's motion to amend the judgment on the estoppel theory, but denying the motion and upholding the judgment on the breach of fiduciary duty theory. The court awarded plaintiff $12,252.00 in attorneys fees and $290.74 in costs. Nationwide filed a Notice of Appeal on August 12, 1991 and Coleman cross-appealed on August 19, 1991.

The United States Court of Appeals for the Fourth Circuit reversed the decision of the District Court. The Fourth Circuit's opinion dismissed all of the plaintiff's claims and found that Nationwide had no fiduciary responsibility to notify Mrs. Coleman or any other plan beneficiary that the

employer had failed to pay the premiums when due. The Court further held that the insurance carrier was not responsible for representations that its own agents made to Mrs. Coleman that the policy was in effect. The Court also held that Nationwide could cancel the insurance policy retroactively to the last date of payment in spite of its undisputed assurances to Mrs. Coleman that the coverage was in effect at the time of her hospitalization.

A petition for rehearing and suggestion for rehearing en banc was filed pointing out to the Court the clear conflict between its decision and the decision of the Eleventh Circuit Court of Appeals in Willett v. Blue Cross & Blue Shield of Alabama, 953 F.2d 1335 (11th Cir. 1992). The Fourth Circuit denied the petition for rehearing and suggestion for rehearing en banc on July 24, 1992.

B. Statement of Relevant Facts

The plaintiff, Joanne Coleman, is married to Glen Coleman, who was employed by a now-defunct roofing contracting firm, Roofing Concepts, Inc. of Mechanicsville, Virginia ("Roofing Concepts"). After terminating its group health coverage with another insurer in late 1988, Roofing Concepts applied to Nationwide for group insurance benefits for its employees and families. Nationwide issued a master policy to Roofing Concepts with a November 1, 1988 effective date. The group medical insurance coverage was funded with employer contributions. The Nationwide policy covered pre-existing conditions of beneficiaries, including Mrs. Coleman's pregnancy.

Roofing Concepts paid Nationwide $3,665.63 at the time of the issuance of the insurance master policy in November,

1988. Nationwide's underwriting department later formally calculated the monthly premium due at $3,709.42, which was $43.79 greater than the initial payment.

On December 1, 1988, Nationwide sent a letter to Joanne Coleman detailing the benefits she was receiving under the group health insurance coverage with Nationwide Insurance (see Appendix F). This letter provided Coleman with her policy number, an enrollment card, and a summary of the group's benefits (see Appendix F). This was the only written plan description received by Coleman. She was not sent a written copy of the master policy. In Nationwide's letter, Coleman was told to call a Nationwide toll-free number or Cheryl Reinick, an Account Representative, if she had coverage questions. She was not told to contact her husband's employer with these

concerns. At no time was Coleman advised by Nationwide that the employer had not paid Nationwide all premiums or that her coverage was in jeopardy.

Coleman knew she would be hospitalized for the birth of her child on or about February 1, 1989 and would incur medical expenses for the birth and delivery of her newborn child. Shortly after receipt of the Nationwide's December 1, 1988 letter, Coleman sought and received an authorization from Capp Care, a cost containment organization retained by Nationwide, to preapprove her for a two-day hospital admission for the birth of her child.

On December 5, 1988, Joanne Coleman received a letter from Capp Care indicating that her hospitalization for the birth of her child had been approved (see Appendix F). Joanne Coleman again called Capp Care in January, 1989 to

advise them she would be hospitalized on January 25, 1989, for the birth of the child. They again approved the hospitalization. Coleman also called Nationwide a number of times thereafter to verify her coverage. At all times, Nationwide employees told her that the coverage was in force as of January 25, 1989.

On February 10, 1989, Nationwide first determined that it had a collection problem with Roofing Concepts and terminated the coverage for non-payment of premiums (see Appendix F).

Joanne Coleman was never advised by Nationwide or Roofing Concepts prior to a March 27, 1989 letter from Nationwide that Roofing Concepts had not paid the premiums on the group health policy after November 1988, or that her coverage was in jeopardy as a result (see Appendix F).

Joanne Coleman had already incurred

the following medical expenses on or about January 25, 1989 for the birth of her child:

Chippenham Anesthesia Association
$ 595.00
Chippenham Hospital
85.00
X-Ray Lab - Outpatient Hospital
Chippenham OB-GYN Association
475.00
Chippenham Hospital 1/25-1/27/89
4,364.02
Chippenham Hospital 1/25-1/27/89
612.05
Chippenham OB-GYN Association
1,450.00
Chippenham OB-GYN Association
75.00

Nationwide paid the following bills:

Chippenham Anesthesia Association
$ 475.00
(Paid on May 28, 1989)
Chippenham Hospital
5.60
(Paid on January 24, 1989)

Nationwide refused to pay the remaining medical expenses incurred by Coleman.

The District Court's judgment to Coleman of $6,048.86 represented hospitalization expenses for which Coleman did not receive reimbursement from Nationwide. Coleman was

subsequently awarded her attorney's fees and costs by the District Court.

V.

REASONS FOR GRANTING THE WRIT

This case raises important issues about the duty of insurance companies who market health insurance plans to private employers to notify participants and beneficiaries in employer-provided health insurance plans of circumstances that jeopardize their benefit coverage under the plan. This case also involves the responsibility of insurance companies--at rock bottom--to avoid affirmatively representing that an individual is covered by a group health policy and then retroactively attempting to cancel that same coverage based on facts that were already known to the insurer at the time it represented the coverage was in force.

The decision of the Fourth Circuit

Court of Appeals in this case conflicts with the decisions of a number of other circuits in regard to the extent of the insurance carrier's fiduciary duty in the administration of a health insurance plan. The decisions which conflict with the Fourth Circuit's holding have uniformly held that ERISA requires that plan fiduciaries notify plan beneficiaries of circumstances that may deprive them of coverage. Review by this Court is necessary to ensure a consistent interpretation of the scope of ERISA's fiduciary duties and to provide protection for plan beneficiaries who otherwise will find themselves without health insurance coverage through no fault of their own.

If the decision of the Fourth Circuit in Coleman is affirmed, health insurance carriers like Nationwide will be encouraged to circumvent ERISA's clear

fiduciary standards and callously inform employees and their beneficiaries that their health coverage is in effect, even though the insurer has actual knowledge that an employer has not paid premiums in full and knows that it (the insurer) will later retroactively revoke the coverage on exactly that basis, thereby depriving the beneficiaries of coverage they believed would be provided. As a result, beneficiaries who have been led to believe that they have coverage for medical expenses will later be denied coverage without prior notice and the opportunity to obtain alternate coverage if the insurance carrier can skillfully draft the plan to exclude it from any fiduciary responsibility to the beneficiaries.

The parties who will suffer from the Fourth Circuit's decision are beneficiaries like Mrs. Coleman who

suddenly and without fault find themselves deprived of promised health insurance coverage and find themselves responsible for medical costs that they legitimately believed were covered by the health insurance plan provided by their employer. Thus, an insurance carrier will be able to conceal from these innocent victims any material information that might affect their coverage even though it had actual knowledge of the breach.

VI.

ARGUMENT

I. THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS IN COLEMAN IS IN DIRECT CONFLICT WITH THE WILLETT DECISION IN THE ELEVENTH CIRCUIT REGARDING CO-FIDUCIARY DUTIES

The Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. §1001, et seq. was enacted by Congress to

provide that employees are not unfairly deprived of their pensions and other employment-related benefits. ERISA was not intended by Congress to furnish health insurers with a new layer of insulation from breaches of fiduciary responsibility to the beneficiaries of pension and welfare plans.

This Court must resolve the clear conflict between the opinions of the Fourth Circuit in Coleman and the Eleventh Circuit in Willett v. Blue Cross & Blue Shield of Alabama, 953 F.2d 1335 (11th Cir. 1992), on the issue of co-fiduciary duties under ERISA.

The factual situations in Coleman and Willett are virtually identical. In both cases, the plaintiffs filed suit against insurers alleging that the insurer had breached its fiduciary duty to notify them that their coverage was in jeopardy. In both cases, the insurers

contended that they intended to contractually assign their disclosure responsibilities under ERISA to the employers. As a result, the insurers contended that they were not required to disclose to the beneficiaries that their insurance coverage was in jeopardy and could, in fact, affirmatively represent that the coverage was in effect only to later retroactively revoke the coverage based on the employers' nonpayment of premiums.

The Eleventh Circuit's opinion in Willett recognizes that although persons or entities with fiduciary responsibilities under ERISA may, by agreement, allocate fiduciary duties among themselves by an express plan provision, they still continue to retain fiduciary responsibility for the actions of their co-fiduciary:

The Employee Retirement and

> Income Security Act of 1974 (ERISA) allows for a fiduciary to delegate a fiduciary duty. "The instrument under which a plan is maintained may expressly provide for procedures ... for allocating fiduciary responsibilities ... among named fiduciaries ...." 29 U.S.C.A. §1105(c)(1) (1985). Providing notice of the discontinuation or suspension of coverage is a fiduciary responsibility; employees are entitled to prompt notice of the suspension of their plan coverage.

953 F.2d at 1340. In Willett, the Eleventh Circuit found that Blue Cross had "clearly delegate[d] ... the responsibility for providing all necessary notices, including notice of a suspension or discontinuance of coverage" to the employer. Id. The insurer had thus contractually assigned the responsibility for providing notice to the employer.

The Eleventh Circuit in Willett nevertheless determined that the co-fiduciary responsibilities in ERISA

§405(c)(2), 29 U.S.C. §1105(c)(2) "may create liability on Blue Cross' part for the losses incurred by the beneficiaries." The Eleventh Circuit premised this potential liability on two distinct grounds. First, the opinion recognized that Blue Cross had a co-fiduciary duty to notify the beneficiaries if it knew that the employer had failed to notify the beneficiaries that the coverage had been suspended:

> We find that section 1105(c)(2) may create liability on Blue Cross' part for the losses incurred by the beneficiaries. Section 1105(c)(2) clearly provides that the delegation of a fiduciary duty does not end forever the delegating fiduciary's responsibility for ensuring that the duty is discharged. Under ERISA, a fiduciary must always be prepared to reassume a delegated fiduciary duty when it becomes apparent to the fiduciary that the party responsible for performing the duty has breached its obligation. Id. at

> §1105(c)(2); id. at §1105(a). A fiduciary who becomes aware that a co-fiduciary has breached a fiduciary duty to plan beneficiaries may not escape liability by simply casting a blind eye toward the breach. 29 U.S.C.A. §1105(c)(2) (1985); id. at §1105(a).

953 F.2d at 1341. The Court thus held that if the insurer has actual knowledge of the employer's failure to notify the beneficiaries that it has not made its insurance premium payments in a timely manner, it has a duty to take reasonable steps to remedy the employer's breach:

> If Blue Cross had knowledge of Mays' failure to inform the plan beneficiaries that their coverage had lapsed for nonpayment of premiums, then Blue Cross incurred a duty to take reasonable steps to remedy the breach. [29 U.S.C.A. §1105(a)(3).]

953 F.2d at 1341-1342.

Secondly, the Eleventh Circuit determined that if the insurer affirmatively advises beneficiaries that

coverage is in effect, rather than informing them the coverage has lapsed, it will be held to have participated in or concealed the breach:

> Moreover, if Blue Cross chose to misrepresent affirmatively to the beneficiaries that they were still covered under the Mays plan rather than inform the beneficiaries that their coverage had lapsed, then liability premised on concealment of the breach would also exist. Id. at §1105(a)(1). Section 1105(a)(1) creates liability for knowing participation in, or knowing concealment of, "an act or omission of such other fiduciary, knowing such act or omission is a breach." Thus, liability on Blue Cross' part may exist under either section 1105(a)(1) or section 1105(a)(3).

953 F.2d at 1342. The Eleventh Circuit thus recognized that ERISA §§405(a) and (c) codifies the co-fiduciary duty not to knowingly participate in or conceal another fiduciary's breach of his trust under ERISA.

In contrast, the Fourth Circuit

Court's opinion in Coleman has totally ignored Nationwide's co-fiduciary duties under ERISA §§405(a) and (c). The Fourth Circuit held that while Nationwide was a fiduciary, the employer, Roofing Concepts, had been assigned by the master policy terms the primary responsibility for giving notice to the beneficiaries of its own non-payment of premiums. The Fourth Circuit held that Nationwide was only a fiduciary "to the extent" that it wanted to be under the terms of its own skillfully drawn policy. The Fourth Circuit simply did not come to grips with the co-fiduciary duties in ERISA §§405(a) and (c), 29 U.S.C. §§1105(a) and (c), that apply when one fiduciary, such as Roofing Concepts, has not fulfilled its responsibilities and the other fiduciary furthers the breach by neglecting to provide notice or by affirmatively misinforming the beneficiary about her

rights. See Willett, supra; 29 C.F.R. 2509.75-8, Q&A FR-13-14, FR-16-17.[1]

II. THE DECISION BELOW HAS CREATED A CLEAR CONFLICT REGARDING THE SCOPE OF A FIDUCIARY'S DUTY OF NOTIFICATION UNDER ERISA

The decision of the Fourth Circuit in Coleman is in direct conflict, not only with Willett, supra, but also with the holdings from other circuits that

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[1] Indeed, the facts in Coleman are even more compelling than in Willett. If Nationwide wanted to allocate the duties of notification to the employer, Roofing Concepts, ERISA requires that the allocation be express in order to comply with ERISA §405(c), 29 U.S.C. §1105(c). An express delegation appears nowhere in this record, nor was it ever disclosed to Mrs. Coleman or other beneficiaries. In fact, the only communications that Mrs. Coleman received indicated that she should look only to Nationwide for notifications about her health coverage. Compare Willett, supra 953 F.2d at 1340. She followed exactly that course and was assured by Nationwide that she had health coverage at the time of her hospitalization.

have also recognized the elementary fiduciary duties to notify beneficiaries of circumstances that jeopardize their coverage and to avoid misleading statements about the same. The Court of Appeals for the District of Columbia, in Eddy v. Colonial Life Insurance Co., 919 F.2d 747 (D.C. Cir., 1990), held that an insurance carrier violated its fiduciary duty when it informed a group health insurance plan covered beneficiary that he could not convert coverage to an individual policy after the group policy was canceled, but did not explain that the beneficiary had the right to continued coverage by paying premiums. The court held that a fiduciary has the duty to disclose material information regarding coverage to the beneficiaries and reversed the district court's ruling denying the claim. The opinion, written by Judge Wald, held that:

> "The duty to disclose material information is a core of a fiduciary's responsibility, animating the common law of trust long before the enactment of ERISA. At the request of the beneficiary (and in some circumstances upon his own initiative), a fiduciary must convey complete and correct material information to a beneficiary." Citing Restatement (2d) of Trusts, §173, Comment d, (1959).

The Court further stated:

> "A fiduciary has a duty not only to inform a beneficiary of new and relevant information as it arises, but also to advise him of circumstances that threaten interest relevant to the relationship. For example a fiduciary bears an affirmative duty to inform a beneficiary of the fiduciary's knowledge of prejudicial acts by an employer - such as the failure of an employer to contribute to a fund as required."

919 F.2d at 750.

Other circuits have uniformly required fiduciaries to notify beneficiaries about circumstances that jeopardize their coverage. In Rosen v.

Hotel and Restaurant Employees and Bartenders Union, 637 F.2d 592, 600 (3rd Cir. 1981), the Third Circuit held:

> Continued eligibility is the core of the trustee beneficiary relationship and those responsible for the fund are required to notify [participants and beneficiaries] when their employer jeopardizes their eligibility [by not making contributions].

The identical principle is found in Local Union 2134, UMWA v. Powhatan Fuel, 828 F.2d 710, 713 (11th Cir., 1987): "[A] fiduciary ... has a duty to keep the beneficiaries of the plan informed as to the insurance coverage or lack thereof, for the plan." See also Dellacava v. Painters Pension Fund, 851 F.2d 22, 27 (2d Cir. 1988) (fiduciary duty to inform beneficiaries of circumstances that threaten the funding of benefits, such as failure to contribute to the fund); Pension Benefit Guaranty Corp. v. Greene, 570 F. Supp. 1483, 1499 (E.D. Pa. 1983)

(fiduciaries breached duty when they knew employer was failing to make contributions and failed to notify participants of deliquency).

McNeese v. Health Plan Marketing, Inc., 647 F. Supp. 981, 986 (N.D. Ala. 1986), concerns facts that are again much like this case. An employer was not funding a health plan and HPM, the health plan claims supervisor, failed to notify participants that their claims were going to go unpaid:

> The facts reveal that HPM did not make an effort to notify any of the claimants, including the plaintiffs, concerning the financial problems with the Intermedical Plan. This court finds that this failure constituted a breach of the defendants' fiduciary obligations to the plaintiffs because without notice they were not able to make other arrangements for insurance coverage.

Berlin v. Michigan Bell Telephone Co., 858 F.2d 1154, 1163 (6th Cir. 1988),

likewise supports Coleman's position that Nationwide had a fiduciary duty not to "materially mislead those to whom the duties of loyalty and prudence described in 29 U.S.C. §1104 are owed." See also Monson v. Century Mfg. Co., 739 F.2d 1293, 1303 (8th Cir. 1984) (fiduciaries breached duty when they knew of and kept silent about employer's breach of duty in failing to make full contribution to plan).

The District Court's opinion in Coleman correctly recognized that Nationwide was the fiduciary who had primary contact with the beneficiaries. Nationwide therefore was held to be responsible for its representations to them concerning plan coverage. Whether or not Nationwide chose to "designate" itself as the plan administrator, it was plainly acting in a fiduciary capacity--a position of trust and confidence--when it

advised Mrs. Coleman of the terms of her health coverage and later assured Mrs. Coleman that her health coverage was in force.

ERISA requires that the fiduciaries administering an employee welfare benefit plan notify the beneficiaries of material circumstances that jeopardize their coverage and enjoyment of the plan's promised benefits. Application of this fundamental principle of fiduciary responsibility is particularly appropriate here. In its written communication, Nationwide expressly advised Coleman to contact Nationwide, not Roofing Concepts, if she had any questions about her plan coverage (see Appendix F). She then contacted Nationwide and was assured that her coverage was in full force and effect. It defies common sense for the insurer to now claim that ERISA, a remedial statute

designed to protect participants and beneficiaries, authorizes Nationwide to make hollow promises and walk away from its responsibility by assigning its obligations to the plan beneficiaries to an employer whom it knows is delinquent in its payments to the insurance carrier.

III. THIS COURT SHOULD DETERMINE THE EXTENT TO WHICH ESTOPPEL PRINCIPLES UNDER FEDERAL LAW SHOULD BE UTILIZED IN ERISA LITIGATION

Estoppel is an equitable doctrine of flexible application, and is recognized as a part of federal law. Heckler v. Community Health Services of Crawford, 467 U.S. 51, 59 (1984). The elements of estoppel are:

(1) a misleading representation or conduct by one party;

(2) inducing detrimental and

> reasonable reliance by the other party.

Heckler, 467 U.S. at 59. The focus is not on the intent of the party to be estopped, but on the effects of that party's conduct on the other party. Saverslak v. Davis-Cleaver Produce Co., 606 F.2d 208, 213 (7th Cir. 1979).

In its Slip Opinion at pages 7-10, the Fourth Circuit Court of Appeals refused to permit Coleman to rely on the oral assurances of coverage that Nationwide made. The circuit courts have diverged on the question of whether estoppel principles should apply only to representations that amount to interpretations of plan provisions or should extend to representations that would require a modification of the benefit plan. However, every circuit that has addressed the issue has agreed that estoppel at least applies to

representations that do not require an outright modification of the plan. See, e.g., National Companies Health Benefit Plan v. St. Joseph's Hospital, 929 F.2d 1558 (11th Cir. 1991); Kane v. Aetna Life Ins., 893 F.2d 1283 (11th Cir.), cert. denied, 111 S.Ct. 232 (1990).

The Court of Appeals in Coleman attempted to avoid the import of these cases by holding that Nationwide's assurances of coverage would necessitate an "outright modification," rather than an interpretation, of the insurance policy. However, the Nationwide policy declared that it would "continue for as long as premiums are paid or until it is cancelled." Emph. added. A form authorization letter to beneficiaries also stated that medical payments were "subject to eligibility and coverage at the time services are rendered." Emph. added.

With due respect, the Fourth Circuit's position that this policy language is unambiguous would artificially allow the exception from estoppel that a few circuits have fashioned for "modifications" to engulf the federal common law rule that estoppel applies. At the time that Nationwide assured Mrs. Coleman that the policy covered her hospitalization, Nationwide possessed both its own group policy and the facts concerning Roofing Concepts' failure to make timely premium payments. Nationwide has never alleged that it misread its own policy when it advised Mrs. Coleman that the insurance policy which covered her hospitalization was in force.

It makes no sense for the Fourth Circuit to foster a fiction that Nationwide advised Coleman that the policy which covered her hospitalization

was in force, even though the representation was clearly false absent an outright modification to the policy. Obviously, Nationwide was not seeking to lie to Mrs. Coleman, but was taking a position about the application of the policy's terms: It told Mrs. Coleman that the medical coverage was in force--even though it knew the sponsoring employer was delinquent in its premium payments. The employer's nonpayment of premiums may have allowed Nationwide to ultimately cancel the policy, but Nationwide's assurance to Mrs. Coleman constituted a promise that any such cancellation would not have retroactive effect. This Court should hold Nationwide to its word.

Even if enforcement of Nationwide's assurances to Mrs. Coleman required a "modification" to the group policy, equity requires these assurances to be

enforced. There is no reason for the beneficiary "who reasonably relied to [her] detriment" on Nationwide's "false representations to suffer" and no reason for the insurer who misled the beneficiary "to be allowed to profit from the misrepresentation." Black v. TIC Investment Corp., 900 F.2d 112, 115 (7th Cir. 1990) (severance plan); see also Armistead v. Vernitron Corp., 944 F.2d 1287 (6th Cir. 1991) (health plan).

CONCLUSION

This Court should hear this case to clearly define the fiduciary's duty under ERISA and resolve the conflict between the circuits regarding the beneficiaries' right to be informed of circumstances that materially affect their health coverage. This Court must also decide whether or not an insurer's practice of retroactively cancelling health insurance

policies in disregard of its own assurances of coverage is in violation of the federal common law regarding estoppel and ERISA.

Respectfully submitted, this 25th day of November, 1992.

JOHN BERTRAM MANN
Levit & Mann
419 North Boulevard
Richmond, Virginia 23220
(804) 355-7766

STEPHEN R. BRUCE
727 15th St., NW, Suite 900
Washington, D.C. 20005
(202) 371-8013

Attorneys for Joanne W. Coleman